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AEDY OSMAN

v.

PP

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FEDERAL COURT, PUTRAJAYA
ALAUDDIN MOHD SHERIFF PCA
ZULKEFLI MAKINUDIN FCJ
JAMES FOONG FCJ
[CRIMINAL APPEAL NO: 05-108-2009(J)]

C

4 OCTOBER 2010

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(2) - Trafficking in cannabis - Convicted and sentenced to death - Appeal against - Whether trial judge erred in finding appellant had possession of the drugs and necessary knowledge of it - Whether appellant succeeded in casting reasonable doubt on the prosecution's case to warrant acquittal*

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The appellant was convicted for trafficking in 1,989 grams of cannabis and was sentenced to death under s. 39B(2) of the Dangerous Drugs Act 1952 (DDA). His appeal to the Court of Appeal was dismissed; thus this appeal. The facts were that an ambush was laid by a team of police officers in the vicinity of a convenience store in Johore Baru. At about 4.15pm, a male Malay ('the appellant') was seen acting in a suspicious manner walking towards the convenience store with a red bag slung over his right shoulder. PW4 and another police officer approached the appellant and declared themselves as police officers. The appellant attempted to escape and after a brief struggle, he was apprehended. PW4 discovered in the red bag two packages of compact dried materials suspected of cannabis and a work pass belonging to the appellant. The suspected cannabis were sent to the chemistry department where they were analyzed and found to be cannabis. Counsel for the appellant herein raised the arguments that (i) the courts had failed to give due consideration to the events and circumstances when they made a finding that the appellant had possession of the drugs and thus the necessary knowledge of it; (ii) that there was a probability a man by the name of Kassim had put the drugs into the red bag and that Kassim could have been the real drug trafficker and (iii) since SP4 was involved in two raids (one on the appellant and the other in a case related to this) he had the opportunity to determine

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if the person arrested in the other raid in Kulai was the real trafficker instead of the appellant as the police should have conducted a thorough investigation to find out whether there was a link between the arrest of the appellant and the one in Kulai.

Held (dismissing the appellant's appeal; affirming the conviction and sentence)
Per James Foong FCJ delivering the judgment of the court:

(1) The trial judge, after maximum evaluation of the evidence presented by the prosecution, had come to the finding that (i) the appellant had possession and control over the red bag and thus had knowledge of the contents therein and (ii) since the appellant had attempted to escape before he was apprehended, the appellant must have known of the contents in the bag for otherwise there was no reason for him to put up a struggle. There was no error committed by the trial judge in coming to such a decision. Regarding intention derived from the struggle between the appellant and the police officers who apprehended him, this was related to the appellant's conduct which was admissible under s. 8 of the Evidence Act 1950 (*Parlan Dadeh v. PP*). Therefore, the trial judge had correctly exercised his discretion in coming to a conclusion that in the circumstances of this case, the struggle between the appellant and the police officers, though in plain clothes, was a factor, amongst others, to imply that the appellant had knowledge of what was inside the bag. (para 10)

(2) All the prosecution witnesses had testified that the appellant was walking alone. There was no motorcycle which the appellant claimed was parked in front of the convenience store where the appellant declared that he had stood beside when he spoke to one Kassim. The implication that Kassim could be the one who placed the incriminating drugs into the red bag was not probable. The alleged conversation between Kassim and the appellant only took two minutes. According to the appellant's own evidence, Kassim only spoke to him through a partially wound down window of his car. There was just no evidence to link Kassim, even though if he had existed, to the placement of the drugs by him into the red bag. However, according to the finding of the trial judge, there was no Kassim. He was a fictitious character invented by the appellant. There was no flaw in this conclusion. (para 18)

A **(3)** The appellant's defence was practically one of mere denial of the existence of the drugs found in his bag. This was reflected in his own testimony. He had not accused any person for planting the drugs there; not even Kassim. Indeed, there was someone who was subsequently arrested in connection with this
B case but except for this, there was no link between the offence which the appellant was charged with with that. Unless there was a connection between the appellant's offence with that of another which may exculpate him from what he was charged with then it was unfair for him to claim that either the
C prosecution had failed to prove its case or that he had cast a reasonable doubt in the prosecution case to warrant an acquittal. (para 23)

Bahasa Malaysia *Translation Of Headnotes*

D Perayu disabit untuk pengedaran dadah 1,989 gram cannabis dan dihukum mati di bawah s. 39B(2) Akta Dadah Berbahaya 1952 (DDA). Rayuannya ke Mahkamah Rayuan ditolak; oleh itu rayuan ini. Faktanya adalah satu serang hendap telah disediakan oleh
E sekumpulan pegawai polis di kawasan kedai mudah beli di Johore Baru. Pada pukul 4.15 petang, seorang lelaki Melayu ('perayu') dilihat berkelakuan mencurigakan berjalan ke kedai mudah beli dengan sebuah bag merah atas bahu kanannya. PW4 dan seorang lagi pegawai polis telah mendekati perayu dan mengisytiharkan diri
F mereka sebagai pegawai polis. Perayu cuba melarikan diri dan selepas satu pergelutan, perayu ditangkap. PW4 menemui di dalam bag merah dua bungkusan bahan-bahan kering padat yang disyaki cannabis dan satu pas kerja kepunyaan perayu. Bahan yang disyaki cannabis itu dihantar ke jabatan kimia di mana ia dianalisa dan
G disahkan sebagai cannabis. Peguam perayu membangkitkan beberapa hujahan iaitu (i) mahkamah gagal memberi pertimbangan wajar kepada peristiwa-peristiwa dan keadaan apabila mereka memutuskan bahawa perayu mempunyai milikan dadah tersebut dan oleh itu mempunyai pengetahuan yang perlu mengenainya; (ii) bahawa
H wujudnya kemungkinan bahawa seorang lelaki bernama Kassim telah meletakkan dadah tersebut ke dalam bag merah dan bahawa Kassim berkemungkinan adalah pengedar dadah haram sebenar dan (iii) oleh kerana SP4 terlibat dalam dua serbuan (satu ke atas perayu dan lagi satu dalam kes yang ada hubungan dengan kes ini) SP4
I mempunyai peluang untuk menentukan jika orang yang ditahan di dalam serbuan yang lagi satu itu adalah pengedar dadah yang sebenar dan bukan perayu dan polis sepatutnya menjalankan satu

penyiasatan yang menyeluruh untuk mengetahui sama ada terdapat perhubungan antara penangkapan perayu dan dengan penangkapan yang lagi satu di Kulai.

Diputuskan (menolak rayuan perayu; mengesahkan sabitan dan hukuman)
Oleh James Foong HMP menyampaikan penghakiman mahkamah:

(1) Hakim bicara, selepas penilaian maksimum keterangan yang dibentangkan oleh pendakwaan, telah membuat penemuan bahawa (i) perayu mempunyai milikan dan kawalan ke atas bag merah dan oleh itu pengetahuan kandungan di dalamnya dan (ii) oleh kerana perayu telah mencuba melarikan diri sebelum ditangkap, perayu berpengetahuan mengenai kandungan-kandungan di dalam beg itu sebab jikalau beliau tidak tahu tiada sebab beliau bergelut dengan pegawai polis. Hakim bicara tidak salah dengan membuat keputusan tersebut. Mengenai niat yang berasal dari pergelutan di antara perayu dengan pegawai-pegawai polis yang menangkapnya, ini berhubungan dengan tingkahlaku perayu yang boleh diterima di bawah s. 8 Akta Keterangan 1950 (*Parlan Dadeh v. PP*). Oleh itu, hakim bicara telah dengan betul melaksanakan budibicaranya dalam membuat kesimpulan bahawa dari segi keadaan-keadaan kes ini, pergelutan di antara perayu dengan pegawai-pegawai polis, walaupun mereka berpakaian biasa, adalah satu faktor, antara lain, untuk mengimplikasikan bahawa perayu mempunyai pengetahuan mengenai apa yang terdapat di dalam beg itu.

(2) Kesemua saksi-saksi pendakwaan telah memberi keterangan bahawa perayu berjalan kaki seorang diri. Tidak terdapat motosikal yang menurut perayu berada di hadapan kedai mudah beli yang perayu berkata beliau telah berdiri di tepinya semasa berbual-bual dengan Kassim. Implikasi bahawa Kassim mungkin orang yang telah meletakkan dadah yang boleh menunjukkan seseorang itu bersalah ke dalam beg merah tidak berkemungkinan. Perbualan yang didakwa berlaku di antara Kassim dan perayu hanya mengambil dua minit. Menurut keterangan perayu sendiri, Kassim hanya berbual dengannya menerusi tingkap kereta yang diturun sekerat jalan. Tidak terdapat keterangan yang menghubungkan Kassim, walaupun beliau wujud, ke penempatan dadah olehnya ke dalam beg merah tersebut. Tetapi, menurut penemuan hakim bicara, Kassim sebenarnya tidak wujud. Kassim adalah karakter tidak benar yang direka oleh perayu. Tidak terdapat kecacatan dalam kesimpulan tersebut.

(3) Pembelaan perayu adalah satu penafian semata-mata mengenai kewujudan dadah-dadah yang dijumpai di dalam beg tersebut. Ini digambarkan di dalam testimoni perayu sendiri. Perayu tidak menuduh sesiapa meletakkan dadah-dadah di dalam bag itu; perayu juga tidak menuduh Kassim. Sememangnya, terdapat seseorang yang kemudiannya ditahan berhubungan dengan kes ini tetapi selain dari itu, tidak terdapat perhubungan di antara kesalahan yang dituduh dilakukan oleh perayu dengan kesalahan yang lain yang mungkin boleh membebaskan perayu daripada apa yang beliau didakwa melakukan dan ia tidak adil untuk perayu mendakwa bahawa pihak pendakwaan telah gagal membuktikan kesnya atau bahawa perayu telah menimbulkan satu keraguan munasabah ke atas kes pendakwaan untuk menjamin satu pembebasan.

Case(s) referred to:
Chow Kok Keong v. PP [1998] 2 CLJ 469 FC ***(refd)***
Gooi Loo Seng v. PP [1993] 3 CLJ 1 SC ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
PP v. Iskandar Mohamad Yusof [2006] 6 CLJ 379 HC ***(refd)***
Yee Wen Chin v. PP & Another Appeal [2008] 6 CLJ 773 CA ***(refd)***

Legislation referred to:
Dangerous Drug Act 1952, s. 39B(2)
Evidence Act 1950, s. 8

For the appellants - Gobind Singh Deo; M/s Gobind Singh Deo & Co
For the respondents - Ahmad Bachee DPP

[Appeal from Court of Appeal; Criminal Appeal No: J-05-175-2008]

Reported by Suhainah Wahiduddin

JUDGMENT

James Foong FCJ:

Introduction

[1] The appellant was convicted for trafficking in 1989 grams of cannabis on 10 February 2006 and was sentenced to death under s. 39B(2) of the Dangerous Drug Act 1952 (DDA). His appeal to the Court of Appeal was dismissed; thus this appeal before us.

Facts

[2] The facts of this case are relatively straight forward.

[3] According to the evidence of the arresting officer, PW4, on information received, an ambush was laid by a team of police officers led by him in the vicinity of a convenience store known as "One Mart 24 Jam" at Jalan Padi Emas 4/1 Bandar Baru Uda, Johore Baru, Johore. At about 4.15pm he noticed a male Malay acting in a suspicious manner walking towards the said convenience store. He had a red bag slung over his right shoulder. PW4 and another police officer approached this man and declared themselves as police officers. This man attempted to escape. After a brief struggle, and with the help of other police officers who were engaged in the ambush, he was apprehended. This man was the appellant. PW4 discovered in the red bag two packages of compact dried materials suspected of cannabis and a work pass belong to the appellant. The suspected cannabis were sent to the chemistry department where they were analyzed and found to be cannabis weighing 1,989 grams.

[4] Before us, Mr. Gobind Singh Deo, counsel for the appellant, raised two principal arguments.

[5] The first concerns the absence of intention ie, *mens rea* in the appellant. According to Mr. Gobind, the courts below have failed to give due consideration to the events and circumstances when they made a finding that the appellant had possession of the drugs and thus the necessary knowledge of it.

[6] He relied on the events disclosed by the appellant in his defence to support this contention. We shall relate what the appellant said.

[7] According to the appellant, he was working as a clerk in a sea forwarding and transport company. On the day in question, he received a call from his father, who was also a member of this company, that certain custom import documents were ready. He returned to the company's office on his motorcycle JHX 8533. He parked his motorcycle in front of the said convenience store and left his bag, his jacket, helmet and key necessary to start the bike on the rack of his motorcycle. It was not for just a moment but from 2.30pm to 4.00pm. He then came down from his office with some documents which he deposited on the rack of his bike. Just then, he met a friend known as Kassim. Kassim, a forwarding agent informed him that the boss of Pelabuhan Tanjung Pelepas was unable to meet him. Kassim then left. This engagement took only two minutes. During re-examination, the appellant explained that

A when he spoke to Kassim, Kassim was inside a car with the car window slightly wound down. His motorcycle was about five meters from Kassim's car. After this conversation, the appellant was arrested.

B **[8]** Before we proceed to analyse the arguments presented by the appellant that his evidence can negate him of his knowledge of the drugs found in the bag it is appropriate to set out what the trial judge said of this.

C **[9]** The trial judge before defence was called, after maximum evaluation of the evidence presented by the prosecution, came to this finding:

(a) The appellant was walking towards the convenience store.

D (b) He was carrying a red bag and inside this bag the impugned drugs were found.

(c) The appellant had possession and control over this bag and thus has knowledge of the contents therein.

E (d) Since the appellant attempted to escape before he was apprehended, the appellant must have known of the contents in the bag for otherwise there is no reason for him to put up a struggle.

F (e) The appellant was acting in a suspicious manner when walking towards the convenience store.

(f) Based on these, the trial judge said:

> G Semua keterangan di atas jika dilihat secara berasingan mungkin bersifat taksa ("equivocal") tetapi jika dinilai secara menyeluruh dan bersama, kelakuan OKT yang meronta-ronta dan cuba melarikan diri ketika ditahan oleh SP 4 itu boleh dibuat inferen yang pasti bahawa OKT mempunyai milikan *mens rea* terhadap dadah yang menjadi hal perkara H pertuduhan. Adalah juga menjadi undang-undang yang mantap bahawa kelakuan OKT sedemikian adalah boleh diterima masuk sebagai keterangan di bawah s. 8 Akta Keterangan 1950 (lihat kes-kes *Parlan Dadeh v. PP* [2009] 1 CLJ 717).

I **[10]** On the evidence as presented at the stage of the prosecution case, we find no error committed by the trial judge in coming to such a decision. Regarding intention derived from the struggle between the appellant and the police officers who apprehended him,

this relates to the appellant's conduct which is admissible under s. 8 of the Evidence Act 1950. This element of conduct has been discussed by this court in detail in *Parlan Dadeh v. PP (supra)*. It is not necessary for us to repeat except to say that the trial judge has correctly exercised his discretion in coming to a conclusion that in the circumstances of this case, the struggle between the appellant and the police officers, though in plain clothes, is a factor, amongst others, to imply that the appellant has knowledge of what was inside the bag. We agree that there may be another inference to this: such as the appellant being scared when pounced upon by certain men unknown to him but then, as the trial judge has said, other factors like the appellant walking in a suspicious manner and carrying a bag over his shoulder which contained the incriminating drugs considered as a whole implies that the appellant has knowledge of what was inside the bag.

[11] Now as regards to the evidence adduced subsequent to the prosecution case, we are of the view that this is very much tied up with the second issue raised by Mr. Gobind. This is the alleged existence of Kassim. Combine this with another piece of evidence which we shall disclose shortly, the appellant intends to convince us that he has raised a reasonable defence.

[12] When PW4 was under cross-examination, he revealed as follows:

> Ada tangkapan lain di Kulai pada hari yang sama, iaitu pada malam hari itu. Saya terlibat dalam tangkapan itu. Ya, ia berkaitan dengan kes yang sama. Barang kes ada dijumpai dalam kes di Kulai itu. Ya, lebih kurung 13 kilogram ganja. Ada tangkapan di buat, nama tidak ingat. Saya ada nyatakan dalam salinan laporan.

[13] According to Mr. Gobind, since SP4 was involved in both raids (one on the appellant and the other in a case related to this) he had the opportunity to determine if the person arrested in Kulai was the real trafficker instead of the appellant. The police should have conducted a thorough investigation to find out whether there was link between the arrest of the appellant and the one in Kulai. He cited the case of *PP v. Iskandar Mohamad Yusof* [2006] 6 CLJ 379 in support. Since the trial judge and the court below did not view the whole evidence objectively and from all angles, the appellant has lost his chance of an acquittal. He cited *Gooi Loo Seng v. PP* [1993] 3 CLJ 1 in support.

[14] Before we proceed to analyse this, we shall set out the grounds of judgment of the High Court relating to Kassim.

[15] Affirmatively, the trial judge rejected the existence of Kassim with these words:

> 'Kassim' bukanlah seorang yang sebenar dan 'Kassim' ialah rekaan OKT bagi melepaskan diri daripada pertuduhan yang dikemukakan terhadapnya.

[16] The reasons he proffered were:

(a) All prosecution witnesses had testified that the appellant was walking alone. There was no motorcycle which the appellant claimed was parked in front of the convenience store where the appellant declared that he stood beside it when he spoke to Kassim. If there was a motorcycle, the police would have seized it and listed it in the search list.

(b) PW4 is believed to be telling the truth judging by his demeanour. When PW4 disclosed another arrest connected with this case, it was during cross-examination. He revealed what he knew and had no evil motive to conceal anything relating to this other case.

(c) The implication that Kassim could be the one who placed the incriminating drugs into the red bag is not probable. The alleged conversation between Kassim and the appellant only took two minutes. In fact this conversation may not have taken place since Kassim could have conveniently passed this message to the appellant through the telephone.

(d) If Kassim had placed the drugs in the red bag there is no necessity to wait for the appellant to come down from his office since the bag was left unattended on the appellant's alleged motorcycle.

(e) The appellant's father (DW2) who testified that he saw Kassim in the car cannot be true. He said this to assist the appellant's version of the defence.

[17] There are two aspects to this argument of the appellant. First, whether it is probable that Kassim had put the drugs into the red bag? Second, was Kassim or another person the real drug trafficker?

[18] According to the finding of the trial judge, there was no Kassim. He was a fictitious character invented by the appellant. We find no flaw in this conclusion. The prosecution has all along insisted that the appellant was alone when arrested and, he was walking towards the convenience store; there was no motorcycle. The events described by the appellant to imply that he had a motorcycle at the material time are just improbable: leaving his bag which contained business documents, his jacket, his helmet as well as the key to his bike on the rack of the bike parked in a public area for 1 1/2 hours unattended. And then you have Kassim who could, as the trial judge said, deliver the message through the phone rather than the need to be physically present. Even accepting the appellant's version that Kassim was there engaging the appellant, it was only for two minutes and Kassim never got out of the car. According to the appellant's own evidence, Kassim only spoke to him through a partially wound down window. There is just no evidence to link Kassim, even though if he had existed, to the placement of the drugs by him into the red bag. And as observantly pointed out by the trial judge, if Kassim had done this, there is no necessity for him to wait for the appellant to come down from his office. The red bag was venerably exposed on the bike for him to do what he pleases. So out of these, there can only be one inference drawn: that Kassim did not exist and it is improbable that he placed the drugs in the red bag.

[19] We accept that there is the evidence of the appellant's father who testified that he saw Kassim in the car at the material time. But against the overwhelming evidence which has proven otherwise the trial judge was right in not believing him. In addition, we would like to add that the evidence of this witness may be tailored to match the appellant since he was present in court when the appellant testified.

[20] Now we turn to the second aspect: was Kassim or another person who was arrested on the same day in Kulai by PW4 the real drug trafficker? According the Mr. Gobind, it is incumbent upon the police to call evidence to rebut the challenge that another person was the real trafficker. Failure of the trial judge to consider this amounts to a misdirection.

[21] It is not in dispute that PW2 had carried out a raid in Kulai on the same day and was related to this case. PW2 however testified that he could not remember the name of the person arrested and disagreed that that person was the real trafficker. That case, according to him was investigated by another investigating officer.

[22] From the authorities cited by the appellant's counsel, it is incumbent upon the prosecution to call evidence to rebut any claim which is relevant and material by the defence in the course of cross-examination of the prosecution witnesses than risking dismissal of its case for want of proof. In *PP v. Iskandar Mohamad Yusof* [2006] 6 CLJ 379, *Chow Kok Keong v. PP* [1998] 2 CLJ 469, *Yee Wen Chin v. PP & Another Appeal* [2008] 6 CLJ 773, it was held that if there is evidence adduced to demonstrate that someone else rather than the accused was the real trafficker, then the trial judge should give due consideration to this before arriving at a decision to convict the accused. But the common thread among these authorities is that the accused had relied on some creditable evidence that another person was the real culprit. In *Mohamad Radhi Yaakob v. PP*, the accused was walking along the main road with one other person who was identified as Hashim. Hashim escaped while the accused threw the bag he was carrying which was later found to contain the incriminating drugs. The accused claimed that he was an innocent carrier and Hashim was the real culprit. Since there was sufficient evidence to prove the existence of Hashim, the accused had his conviction for trafficking set aside and replaced with one for possession. In *Chow Kok Keong v. PP*, again there was evidence to indicate the existence of another person who handed the bag to the accused that led the Federal Court to substitute a conviction of trafficking to that of possession. The same sort of facts appears in both *Yee Wen Chin v. PP & Anor*. and *PP v. Iskandar Mohamad Yusof*.

[23] In this instant case however, the appellant's defence was practically one of mere denial of the existence of the drugs found in his bag. This is reflected in his own testimony. He has not accused any person for planting the drugs there; not even Kassim. In fact, his conversation with Kassim was brief and there is nothing in his evidence to implicate Kassim as the person who inserted the drugs inside his bag. His counsel's cross-examination of PW4 does not indicate that he was framed. Indeed, there was someone who

was subsequently arrested in connection with this case but except for this, there is no link between the offence which the appellant was charged with that. Unless there is a connection between the appellant's offence with that of another which may exculpate him from what he is charged then it is unfair for him to claim that either the prosecution has failed to prove its case or that he has cast a reasonable doubt in the prosecution case to warrant an acquittal.

[24] For these reasons we are of the opinion that the appellant's appeal should be dismissed. Accordingly, we affirm the conviction and sentence passed by the courts below.